SANABUNG SAMPAI & ORS A

v.

HYDROFLOW SDN BHD & ORS

HIGH COURT SABAH & SARAWAK, KUCHING B
RAVINTHRAN PARAMAGURU J
[SUIT NO: 21-15-2010-III]
15 MAY 2013

CIVIL PROCEDURE: *Declaration - Application for - Determination of native customary rights - Whether provisional leases granted on native customary land - Action against first and second defendants struck out for want of prosecution - Plaintiffs maintained prayers for declaratory orders against third and fourth defendants - Whether granting of declaratory orders would affect rights of first and second defendants - Whether prayers could be granted despite action against first and second defendants struck out* C D

NATIVE LAW AND CUSTOM: *Land dispute - Customary rights over land - Determination of native customary rights ('NCR') - Claim based on 'temuda' and 'tanah umai' - Whether provisional leases granted on NCR land - Existence of NCR denied by defendants - Whether plaintiffs established NCR over lands on balance of probabilities* E

This was a representative action brought by the three plaintiffs on their own behalf and on behalf of their fellow residents of three villages located in Simunjan, Sarawak. Their claim was for a declaration that an area of about 5,000 hectares near the villages was their native customary rights ('NCR') land. This area was demarcated and shaded in map 'M' which was attached to their statement of claim. Originally there were four defendants. The first two defendants were companies that had been issued provisional leases ('PLs') which allegedly cover a large part of the NCR land of the three villages. However, before the trial commenced, the first and second defendants were struck out by the court as defendants on the ground of want of prosecution. The third and fourth defendants were the Superintendent of Lands and Surveys Department of Samarahan Division and the Government of Sarawak. In spite of the removal of the first and second defendants, the plaintiffs proceeded with the suit against the third and fourth defendants ('Sarawak Government'). The plaintiffs called a total of 15 witnesses whereby 11 witnesses were F G H I

residents of the three villages. Among the witnesses were the Iban custom expert ('PW1') and Nicholas Bawin Anggat, the community mapper ('PW12'). PW1 testified that apart from 'temuda' land, an Iban long house community could collectively lay claim, as per their custom, to a territorial domain known as the 'pemakai penoa'. However, there was divergence of opinion between PW1 and the government. The government's position was that the concept of 'pemakai menoa' or 'pulau' was not recognised by the codified Adat Iban of 1993. PW12 who was neither an academically qualified surveyor nor a registered surveyor drew map 'M' which was attached to the statement of claim. Counsel for the government argued that Map 'M' was not admissible because PW12 was not a registered surveyor. The plaintiffs claimed that their villages had been established by their ancestors and that some villagers had inherited 'temuda' land and 'tanah umai'. For evidence that they owned 'temuda' land, some of the witnesses referred to occupation tickets, land transfer documents and records of fertiliser subsidy schemes that were granted by the Agriculture Department through the Pertubuhan Peladang Kawasan Simunjan. Apart from 'temuda' lands, the witnesses also claimed that their ancestors from time immemorial had foraged for sustenance in the forests near the village. On the contrary, the defendants' case was that the area covered by the PLs were almost totally covered by permanent and dense forest prior to 1958 and that the villages were outside the area covered by the three PLs. Further the defendants contended that the areas that fell under the occupation tickets referred to by some of the residents were also outside the area covered by the PLs. In the premises, the defendants argued that the plaintiffs had not established NCR rights over the area claimed. The principal issue was whether the plaintiffs had proved that they have NCR over the area covered by the PLs and the wider area marked in the map 'M' attached to the statement of claim.

Held (dismissing plaintiffs' claim for declaration of NCR on land with provisional leases):

(1) The NCR claim based on 'temuda' and 'tanah umai' was based on thin ice. None of the plaintiffs' witnesses could say with certainty that their 'temuda' lands were within the PLs area of the Sarawak Government. Further, PW2 could not say categorically whether the landmarks such as burial grounds,

old settlement and 'temuda' lands were within the PLs area. In the absence of aerial photographs, ground survey evidence and oral history could support a NCR claim. However, the oral history evidence of the witnesses that the 'temuda' lands were within the PLs area was not convincing. Most of the witnesses also said that their 'temuda' lands had not been encroached by the Sarawak Government. Compared to their evidence, DW2, the Superintendent of Lands and Surveys of Samarahan Division, said that any alienated land such as occupation ticket land would not have been included in the PLs that were granted to the first and second defendant. In the premises, the plaintiffs had not proved on a balance of probabilities that their 'temuda' lands were inside the PLs area. (paras 39, 41 & 42)

(2) It was beyond dispute that the 'pemakai menoa' was for the benefit of an entire community. Therefore, although not every resident or headman in the area of interest was required to appear in court to support the claim, there should at least be considerable unanimity amongst the residents and the different villages bordering the purported 'pemakai menoa' in respect of their right to assert a claim to it. In the instant case, the plaintiffs themselves have admitted that the other villages, residents and headmen did not support their action. The validity of the claim of the relatively few plaintiffs from only three villages over a very large area was therefore thrown into doubt. In conclusion, the claim for the vast area of 5,000 hectares purely based on the oral history related by some of the witnesses that their ancestors hunted in that said area was not convincing. The plaintiffs had not proved that they possessed NCR over the area referred to in map 'M'. (paras 46 & 47)

(3) Since map 'M' was not being used for the purpose of the Land Code, it did not fall foul of the requirement that it should be prepared by a registered surveyor. Therefore the argument by the Sarawak Government that map 'M' must be prepared by a registered surveyor was rejected. (para 17)

(4) Even after the first and second defendants had been struck out, the plaintiffs maintained the prayers for declaratory orders and for the prayer to excise the PLs area from the purported NCR area. Even if the plaintiffs had proved the existence of

NCR in the area of interest, these prayers could not be granted as it would affect the rights of the first and second defendant who had been struck out as defendants on the ground of 'want of prosecution'. (para 49)

Case(s) referred to:

Agi Bungkong & Ors v. Ladang Sawit Bintulu Sdn Bhd & Ors [2010] 1 LNS 114 HC ***(refd)***

Andawan Ansapi & Ors v. PP [2012] 2 CLJ 405 HC ***(refd)***

Ara Binte Aman & Ors v. Superintendant Of Lands And Mines, 2nd Div [1973] 1 LNS 5 HC ***(refd)***

Director of Forests, Sarawak & Anor v. Balare Jabu & Ors and Another Appeal [2012] 7 CLJ 685 FC ***(refd)***

Everly Bajut ak Poh & 24 Others v. the State Government of Sarawak & 2 Ors (Unreported) ***(refd)***

Hamit Matusin v. Superintendent Of Lands And Surveys & Anor [2001] 6 CLJ 303 HC ***(refd)***

Jubang anak Punjab & Ors v. First Binary & Ors (Unreported) ***(refd)***

Luking Uding & Ors v. Superintendent of Lands and Surveys Kota Samarahan Division & Ors [2011] 7 CLJ 342 HC ***(refd)***

Muli ak Baya & Anor v. Everight Enterprise (Unreported) ***(refd)***

Nicholas Mujah Ason & Ors v. Hock Tong Hin Sawmill Co Bhd & Ors [2012] 1 CLJ 749 HC ***(refd)***

Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors [2001] 2 CLJ 769 HC ***(refd)***

Superintendent Of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors And Another Appeal [2005] 3 CLJ 555 CA ***(refd)***

TR Sandah ak Tabau & 7 Ors v. Kanowit Timber Sdn Bhd & 2 Ors (Unreported) ***(refd)***

TR Gayan ak Tupai & 3 Ors v. Vita Hill Sdn Bhd & 2 Ors (Unreported) ***(refd)***

TR Usah Lutong & Ors v. Lembaga Tabung Haji & Ors [2009] 9 CLJ 296 HC ***(refd)***

Legislation referred to:

Land Code (Sarawak) (Cap 81), s. 5

Land Surveyors Ordinance 2001 (Sarawak) (Cap 40), ss. 17(a), 20

Public Authorities Protection Act 1948, s. 2(a)

For the plaintiffs - See Chee How (Simon Siah with him); M/s Baru Bian & Co Advocs

For the defendants - Saferi Ali; State AG's Chambers

Reported by Sandra Gabriel

JUDGMENT

Ravinthran Paramaguru J:

Introduction

[1] This is a representative action brought by three plaintiffs on their own behalf and on behalf of their fellow residents of three villages, ie, Kampung Sungai Lingkau, Kampung Melanjok and Kampung Sekendu which are located in Simunjan, Sarawak. Their claim is principally for a declaration that a large area of about 5,000 hectares near the said villages is their Native Customary Rights (NCR) land. This area is demarcated and shaded light brown, yellow and brown in map "M" which is attached to the statement of claim. Originally there were four defendants. The first two defendants are companies that had been issued Provisional Leases (PLs) which allegedly cover a large part of the NCR land of the said three villages. The first defendant was issued a PL over Lot 1226 and Lot 1242 of Sedilu-Gedong Land District. The second defendant was issued a PL over Lot 1224. However, before the trial commenced, the first and second defendants were struck out by the court as defendants. The ground of the striking out application was "want of prosecution". The plaintiffs did not appeal against the decision. The third and fourth defendants are the Superintendent of Lands and Surveys Department of Samarahan Division and the Government of Sarawak. In spite of the removal of the first and second defendants, the plaintiffs still proceeded with the suit against the third and fourth defendants whom I shall collectively refer to as the Sarawak Government.

Case For The Plaintiffs

[2] The plaintiffs called a total of 15 witnesses. Eleven of these witnesses are residents of the said three villages. The other witnesses were the Iban custom expert (PW1, Nicholas Bawin Anggat), the community mapper (PW12, Nicholas Mujah) and two agriculture department officers (PW14, Razaman bin Ibrahim and PW15, Mahader bin Amit) who testified as to the grant of fertiliser subsidies to some of the villagers through the Pertubuhan Peladang Kawasan Simunjan.

[3] The eleven villagers each gave lengthy testimony to support their claim that the land surrounding their respective villages is a NCR land. Their evidence is largely based on oral history with

some references to documents such occupation tickets and agriculture department or Pertubuhan Peladang Kawasan Simunjan records of grant of fertiliser subsidies to the residents. The testimony of the 11 witnesses fell into a pattern and the common assertions in the evidence of the 11 witnesses are as follows:

(1) Their villages had been established long before 1958 by their ancestors.

(2) Some of the villagers had inherited "temuda" (cultivated land left to fallow) and "tanah umai" (cultivated land) of varying acreage.

(3) As for the evidence that they owned "temuda" land, some of the witnesses referred to occupation tickets, land transfer documents and records of fertiliser subsidy schemes that were granted by the agriculture department through the Pertubuhan Peladang Kawasan Simunjan.

(4) Apart from "temuda" lands, the witnesses also claimed that their ancestors from time immemorial had foraged for sustenance in the forests near the village.

[4] I shall now summarise the evidence of the other witnesses. PW1 was called as an Iban custom expert witness by the plaintiffs. He is a former Deputy President of the Majlis Adat Istiadat Sarawak. He told the court that he had testified in a number of NCR cases and that his evidence has been accepted by the High Court. He listed the said cases as follows:

(a) Case No: 21-6-2009, Sibu High Court: *Muli ak Baya & Anor v. Everight Enterprise*;

(b) Kuching High Court Case No: 22-118-2007-I: *Nicholas Mujah Ason & Ors v. Hock Tong Hin Sawmill Co Bhd & Ors* [2012] 1 CLJ 749;

(c) *Agi Bungkong & Ors v. Ladang Sawit Bintulu Sdn Bhd & Ors* [2010] 1 LNS 114;

(d) Sibu High Court Case No: 21-2-2009: *TR Sandah ak Tabau & 7 Ors v. Kanowit Timber Sdn Bhd & 2 Ors*;

(e) Sibu High Court Case No: 21-4-2009: *TR Gayan ak Tupai & 3 Ors v. Vita Hill Sdn Bhd & 2 Ors*;

(f) Kuching High Court Case No: 22-43-2002-I: *Luking Uding & Ors v. Superintendent of Lands and Surveys Kota Samarahan Division & Ors* [2011] 7 CLJ 342.

[5] He also told the court that his expert evidence on Iban Adat had been accepted by the courts. I have no reason to doubt his statement. I have also accepted him as an expert witness in two of my cases ie, Suit No: 22-218-2010-II *Numpang anak Suntai & Ors v. Quality Concrete Holdings Bhd & Ors* and Suit No: 22-10-2007-1 *Jubang anak Punjab & Ors v. First Binary & Ors*. I gave my reasons for accepting him as an expert on Iban customs in those cases and I see no reason to depart from that decision. PW1's expert evidence pertaining to Iban customs has been recounted in detail in the famous case of *Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 2 CLJ 769 and some of the other cases cited above. I shall, therefore, only address the divergence of opinion between PW1 and the government. PW1 referred to the acquisition of "temuda" land as the clearing of the forests by a pioneering longhouse community. Learned counsel for the government did not dispute that "temuda" land acquired prior to 1 January 1958 can be recognised as NCR land in accordance with s. 5 of the Land Code (Sarawak) (Cap 81). However, the point of divergence is this. PW1 also testified that apart from "temuda" land, an Iban longhouse community can collectively lay claim as per their custom to a territorial domain known as the "pemakai menoa". The "pemakai menoa" can be a vast area that includes not only "temuda" lands, burial grounds (pendam), old longhouse sites (tembawai) but also a "pulau" which is an island of virgin forests set aside and reserved for foraging, hunting and taking of jungle produce. The government's position is that the concept of "pemakai menoa" or "pulau" is not recognised by the codified Adat Iban of 1993. Apart from the point of divergence in respect of the concept of "pemakai menoa", PW1's evidence on other areas such as creation of "temuda" land and "tanah umai" in accordance with customary law was not challenged by counsel for the government.

[6] PW12 drew map "M" which is attached to the statement of claim. He is neither an academically qualified surveyor nor a registered surveyor but he is what is known as a "community mapper". I shall reproduce here a passage from the judgment of Linton J (as he then was) in *Luking Uding & Ors v. Superintendent of Lands and Surveys Kota Samarahan Division & Ors* [2011] 7 CLJ 342 to describe what is meant by a "community mapper":

A Community Mapping includes taking and recording the communal land boundary of the longhouses or villages based on information provided by the residents and elders of the longhouses or villages and the locations of the longhouses or villages, their gardens, farms, temuda, old longhouse sites (tembawai), cemetery (pendam), pulau, rivers and other landmarks within the communal land boundary of the longhouse or village.

The recording of all these data or information are done with the participation of the residents and elders including the Tuai Rumah of the longhouse or village. When recording the coordinate points on the communal land boundary (antara/garis menua) of the longhouse or village, it is also necessary to get the participation of the people of the neighbouring or surrounding longhouses or villages so that there will be no dispute on the land boundary when the data are printed on the map of the land boundary later on. The map of the land boundary must also be shown to the respective longhouses or villages after it was printed or plotted for their confirmation of the contents of the map.

[7] The survey was not done using conventional survey tools but by means of a Global Position Device (GPS) and a computer software known as Geographic Information System to plot and produce a map. During cross-examination, PW12 made the following concessions. He agreed that his map did not contain any co-ordinates. He and his assistant plotted the boundary of the "pemakai menoa" based on information solely provided by some of the residents from the said three villages. PW12 told the court that during the survey, he found a few burial grounds, old settlements and "temuda" lands. However, when cross-examined he could not say with certainty that these sites are located within the PLs area of the first and second defendants.

[8] PW14 is the agriculture department officer in Simunjan. He confirmed that, by perusing the Pertubuhan Peladang Kawasan records, some of the villagers had been given fertiliser subsidy by his department. However, he agreed with the submission of counsel for the government that his department does not determine whether a particular parcel of land has NCR status. PW15 also identified records of the Pertubuhan Peladang Kawasan in relation to grant of fertiliser subsidy to some of the residents from the said villages.

The Case Of The Defence

[9] The defendants' case is that the area covered by the PLs and even the wider area were almost totally covered by permanent and dense forest prior to 1 January, 1958. The villages in question were outside the area covered by the three PLs and this fact is not in dispute. Furthermore, the areas that fall under the occupation tickets referred to by some of the residents were also outside the area covered by the PLs. In the premises, the plaintiffs had not established NCR rights over the area claimed in map "M". The defendants called only three witnesses; Encik Roslan bin Mohamad Ramli (DW1), Roslan bin Putit (DW2) and Romy Pudong (DW3). All of them are government officers.

[10] DW1 is also the Head of Aerial Photo Interpretation Unit (APIU), Photogrammetry Section of the Lands and Surveys Department. He prepared a report of his interpretation of the aerial photograph of the disputed area. The photographs were taken in 1947 and 1962. His report stated that almost the entire area of the PLs was covered with permanent and dense forest at the time the photographs were taken in 1947 and even in 1962. The interpretation of DW1, the aerial photography expert of the government was not rebutted by way of expert witness evidence. However, counsel for plaintiffs challenged the findings of DW1 in his submission. In my opinion, the findings of an expert witness which is not challenged rebuttal evidence should be given due weight unless there are good reasons to conclude otherwise. The plaintiffs ought to have called their own expert witness if they contended otherwise.

[11] DW2 is the Superintendent of the Lands and Surveys of Samarahan Division. It is the duty of his office to determine the validity of NCR claims that are submitted by the natives. He said that the area claimed by the plaintiffs is not subject to NCR. His reason is that:

> ... based on aerial photograph taken in 1947 and even in 1962 showed that almost the entire area which was issued with the Provisional Leases within the area claimed by the Plaintiff was still covered with primary forest.

[12] He also said that there was no alienated land such as occupation tickets within the area of the PLs. He said that all alienated lands would have been excluded before the issuance of the PLs.

[13] DW3 is a draftsman attached to the lands and surveys department. He was called to tender the gazette notifications of two forests reserves, ie, the Simunjan Forest Reserve that was constituted in 1959 and the Tebuan Alit Communal Forest Reserve that was constituted in 1958. These two forests reserves are within the area of interest, ie, the area claimed in map "M" by the plaintiffs.

Issues

[14] The principal issue in this case is whether the plaintiffs have proved that they have NCR over the area covered by the PLs in question and the wider area marked in the map "M" attached to the statement of claim. Before I proceed to address this issue, I shall address the following related issues raised by counsel for the plaintiff and counsel for the government:

(1) Whether the map "M" drawn by PW12 is inadmissible in evidence?

(2) Whether the concept of "pemakai menoa" is part of prevailing Native Customary Law?

(3) Whether the constitution of forest reserves extinguishes NCR?

(4) Whether the claims are barred by the Limitation Ordinance of Sarawak or s. 2(a) of the Public Authorities Protection 1948?

Admissibility Of Map "M"

[15] Map "M" identifies the purported NCR area of the three villages, ie, Kampung Sungai Lingkau, Kampung Melanjok and Kampung Sekendu. It is a large area of over 5,000 hectares. The three PLs issued to the first and second defendants are largely on this area. The deconstituted former forest reserves of Simunjan and Tebuan Alit are also within the PLs area. The argument of the counsel for the government is that map "M" is not admissible because the maker, ie, PW12 is not a registered surveyor. He cited the case of *TR Usah Lutong & Ors v. Lembaga Tabung Haji & Ors* [2009] 9 CLJ 296 where the court rejected a map prepared by an unregistered land surveyor. The basis of that decision was that the Land Surveyors Ordinance 2001 (Sarawak) (Cap 40). Section 17(a) and 20 of reads as follows:

> 17. Without prejudice to section 104 of the Code, no person, shall, unless he is a land surveyor:

(a) practice or carry on business or take up employment as a licensed land surveyor or undertake any cadastral land survey in the State of Sarawak;

...

20. No cadastral land surveyor survey plan thereof shall be accepted or adopted for the purpose of the Code or any other written law unless it has been approved by the Director of Lands and Surveys or by other officer authorized by him to approve survey plans on his behalf.

[16] PW12 agreed that he is not a registered surveyor but a "community mapper". A similar decision was also made in *Nicholas Mujah Ason & Ors v. Hock Tong Hin Sawmill Co Bhd & Ors* [2012] 1 CLJ 749; [2011] 1 LNS 322 and *Tetangga Akrab Sdn Bhd v. Tuan ak Jawie & 50 Ors* [Suit No: 22-132-2000 III/II]. However, in *TR Gayan ak Tupai & Ors v Vita Hill & Ors* [Sibu High Court Civil Suit No: 21-4-2009] and *TR Sandah ak Tabau & Ors v. Kanowit Timber Sdn Bhd & Ors* [Civil Suit No: 21-2-2009], Yew Jen Kie J held a contrary view which I followed in the case of *Numpang anak Suntai & Ors v. Quality Concrete Holdings Bhd* [Suit No: 22-218-2010-II]. Her Ladyship Yew Jen Kie J in *TR Gayan ak Tupai & Ors v. Vita Hill & Ors* (*supra*) said as follows:

My understanding from reading ss. 18, 19 and 20 of the Land Surveyor Ordinance is that if the Map is not used for submission for the purpose of the Code or any written law or for the purpose of lodging with the Lands and Surveys, it is not necessary to obtain approval of the Director of Lands and Surveys. As such, the Map marked M which is produced and used solely in the court as evidence does not need the approval of the Director of Lands and Surveys.

Similar argument was advanced before me in the case of *TR Sandah ak Tabau & 7 Ors v. Kanowit Timber Sdn Bhd & 2 Ors* [Civil Suit No: 21-2-2009 In the High Court in Sabah and Sarawak at Sibu). In rejecting the argument, I held that section 17 does not apply in this case because the witness in that case did not prepare the locality map with the purpose of practicing as land surveyor. He was merely, with the help of the elders of the longhouses, charting out the boundary of the claimed area.

[17] Following the above case, I had ruled in the *Numpang* case that since map "M" is not being used for the purpose of the Land Code such as subdivision or approval of development plans, it does not fall foul of the requirement that it must be prepared

by a registered surveyor. I shall therefore reject the argument of counsel for the government that map "M" must be disregarded on this ground alone.

Concept Of Pemakai Menoa

[18] Counsel for the government has argued forcefully that the concept of pemakai menoa or territorial domain, especially for purposes of foraging the forest for sustenance is not part of the Adat Iban 1993. For that reason, he urged the court to accept the prevailing law on NCR that recognises only land cleared for farming before 1958, ie, "temuda" land or "tanah umai" that belongs either to the longhouse community or the individual resident. He also urged the court to reject the concept of "pulau" or communal forest reserves that exist within the pemakai menoa for the benefit of the longhouse residents. Both counsel for the government and counsel for plaintiffs have, in customary fashion, cited a plethora of authorities that includes court decisions, government circulars and text books on this subject. I have addressed this issue and some of the authorities cited in this case in two of my previous judgments. As I am not departing from my previous decision on this point, I shall reproduce the following passage from my judgment in *Jubang anak Punjab & Ors v. First Binary & Ors* [Suit No: 22-10-2007-I]:

> This issue has been addressed in recently decided court cases. In the well-known case of *Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors* (*supra*), Ian Chin J dismissed the argument that the Adat Iban 1993 did not recognize the Iban custom of "Pulau". His Lordship said that the Adat Iban 1993 and the Tusun Tunggu is not exhaustive as the concept of "Pulau" was not unambiguously excluded. His Lordship said as follows:
>
> > Mr. Tan's argument is that because the term "pulau" is not mentioned in the Adat Iban nor in the Tusun Tunggu, it means that "this practice is not in accordance with the customary law". For that argument to succeed it must be shown that there are provisions in the Adat Iban to say that unless a custom is mentioned in it, such a custom is no longer to be recognised or regarded as a native customary right. There is no such provision because it was not so intended.

Although the above decision of Ian Chin J was reversed in respect of the finding of facts, the pronouncement of law in respect of the conclusiveness of Adat Iban was not reversed. Undeterred, counsel for second, third and fourth defendants also cited the following passage from the Court of Appeal decision in the above case (*Superintendent of Land Surveys, Bintulu v. Nor Anak Nyawai & Ors and Anor appeal* [2005] 3 CLJ 555):

> Further, we are inclined to agree with the view of the learned trial judge in *Sagong bin Tasi & Ors* (*supra*) that the claim should not be extended to areas where 'they used to roam to forage for their livelihood in accordance with their tradition'. Such view is logical as otherwise it may mean that vast areas of land could be under native customary rights simply through assertions by some natives that they and their ancestors had roamed or foraged the areas in search for food.

However, as pointed out in other subsequent cases (see *Nicholas Mujah anak Ason & 2 Ors v. Hock Thong Hin Sawmill Co Sdn Bhd & 3 Ors*, 22-118-2007-1, Kuching High Court), the above passage must be read in the light of the Court of Appeal's view that there was no evidence to support the claim that the disputed area was a traditional foraging area. The Court of Appeal said that:

> On the basis that the Disputed Area was covered with jungles in 1951, with no evidence of 'temuda' or 'pulau' or 'pemakai menoa' having been credibly established, in the circumstances of this case under appeals, the claim for the area to be under native customary rights is a non-starter. And it follows that the issues of which statute is applicable or whether the area was abandoned do not arise. Having said that we must hasten to add that this case should not necessarily be a precedent for other potential claims where proof may be readily available.

The Court of Appeal therefore did not make a decisive pronouncement that a claim based on "Pemakai Menoa" and "Pulau" is defeated by the prevailing Native Customary Law of Sarawak. In fact in another celebrated case (*Kerajaan Negeri Johor & Anor v. Adong bin Kuwau & Ors* [1998] 2 CLJ 665), the Court of Appeal expressly approved the right of the native to live off the land. In Sarawak, the argument that "Pemakai Menoa" or "Pulau" is not part of the Native Customary Law that is enforceable was rejected in other recent cases (see *Agi Anak Bungkong & 2 Ors v. Ladang Sawit Bintulu Sdn Bhd & 4 Ors* [22-93-2001-III (I)], *Mohamad Rambli Kawi v. Superintendant Of Lands Kuching & Anor* [2010] 1 LNS 115 and *Muli Anak Baya & Anor v. Everight Enterprise* [21-6-2009], Sibu High Court).

A I shall respectfully follow the above decisions and hold that Native Customary Law that pertains to "Pemakai Menoa" and "Pulau" has legal recognition.

[19] Similarly, I still hold the same view that the concept of "pemakai menoa" and "pulau" is part of the prevailing Native B Customary Law.

Whether The Constitution Of The Forest Reserves Extinguishes NCR?

[20] The production of the gazette notification by DW3 revealed C that almost the entire areas of the PLs were once part of the deconstituted Simunjan Forest Reserve and the Tebuan Alit Communal Forest Reserve. Counsel for the government then argued that, insofar as the Simunjan Forest Reserve is concerned, no native privileges were provided in the gazette notification. He D also cited authorities to argue that NCR is not admitted or created in land acquired as Reserved Land. He cited *Ara Binte Aman & Ors v. Superintendant Of Lands And Mines, 2nd Div* [1973] 1 LNS 5; [1975] 1 MLJ 208) where BTH Lee J said as follows:

E Section 10(2) of the Land Code (Cap 81) provides:

> No person whether a native or a non-native may occupy any Native Customary Land or any Reserved Land save under and in accordance with the conditions applicable thereto by virtue of this or any other written law, and any F person in occupation thereof shall be deemed to be in unlawful occupation of Crown land...
>
> The land being Government Reserve, it is abundantly clear that no person can exercise customary rights over it.

G **[21]** In the other case cited by counsel for the government, ie, *Hamit Matusin v. Superintendent Of Lands And Surveys & Anor* [2001] 6 CLJ 303, Sulaiman Daud J said as follows:

> In other words no native customary rights are capable of being acquired if the said land were within the river bank reserve before H 1 January 1958. Similarly where a native customary right have been acquired and if, after its acquisition, it becomes a river bank reserve such right shall cease to subsist. By reason thereof I am of the view that the defendants can also succeed in their defence if they can prove that the said lands were or are within the river I bank reserve at any time on or before 15 January 1958 or if native customary rights have been acquired, at any period of time after such acquisition.

[22] However, several other cases that followed the decision of Ian Chin J in *Superintendent Of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors And Another Appeal* [2005] 3 CLJ 555, held that the law respects the primacy of pre-existing native customary rights. Thus in *Andawan Ansapi & Ors v. PP* [2012] 2 CLJ 405, David Wong J overruled the decision of the Magistrate that NCR cannot be claimed in a forest reserve. In the premises, regardless of the fact that the disputed area in the instant case was once constituted as a forest reserve, the plaintiffs would still be able to assert NCR if it is proven that it pre-existed the date of gazette notification and if the NCR had been acquired before 1 January 1958. However, for reasons I shall advert to later, in the instant case, I am not satisfied that the plaintiffs have proved the existence of NCR before those dates. In fact, in respect of the proclamation of the Tebuan Alit Communal Forests Reserve, the gazette notification reserved some privileges to Tuai Rumah Odol and his successors to take forest produce. In the instant case, none of the witnesses traced their lineage to Tuai Rumah Odal or his successors or followers.

Limitation

[23] Counsel for the government submitted that plaintiffs' claims herein are barred by virtue of the Limitation Ordinance of Sarawak and/or s. 2(a) of the Public Authorities Protection Act 1948. However, this point was not elaborated. In my opinion, assuming that the plaintiffs have proved the pre-existence of NCR, limitation law would not affect their claim. The Federal Court in the *Director of Forests, Sarawak & Anor v. Balare Jabu & Ors and Another Appeal* [2012] 7 CLJ 685 considered the question whether limitation applies to declaratory orders. Although the question was not answered directly, the Federal Court considered the fact that the case involved NCR and said as follows:

> As such we are of the view that as long as the Licence remains valid, it continues to be subject to the Respondents' NCR, if any, and rights in respect of the land concerned.

[24] The Federal Court relied on the second limb of s. 2(a) of the Public Authorities Protection Act which reads as follows:

> ...in the case of a **continuance of injury or damage**, within thirty-six months next after the ceasing thereof; (emphasis added)

[25] Therefore, in my opinion, assuming that the plaintiffs are able to prove the issuance of PLs, delay in approaching court would not result in limitation setting in as there is "continuance of injury".

Whether Plaintiffs Have Proved NCR?

[26] This is the crucial issue in this case. The plaintiffs have led evidence to support a claim that the plaintiffs have "temuda" land in the area covered by the PLs. They have also testified that their ancestors have hunted and foraged in the area of the PLs which have been preserved as a "pulau" or communal forests. I shall first consider the evidence of some of the witnesses that they owned "temuda" land in the area covered by the PLs.

"Temuda" Land

[27] PW2 (Dana anak Aman) was born in Kampung Sg Linkau. His parents were born there as well. He said that his grandfather is the owner of Occupation Ticket No: 088. The land was later transferred to PW2's father. He also produced a circular (Circular RO. 3/1937) from the colonial authorities about a rubber garden on the land covered by the said occupation ticket. He said that his grandfather was the first person to clear the land. However, during cross-examination, he admitted that he does not know if any specific area is mentioned in the occupation ticket.

[28] PW3 (Jepon anak Bongkok) is 71 years old. He was born in Kampung Malanjok. He said that most of the villagers of Kampung Malanjok had been given subsidy by the government to plant paddy, coconut and rubber. During cross-examination, he agreed that the fact that fertiliser subsidy was given does not mean that the planting area extended to the PLs area of the first and second defendant. He said as follows:

> Q: See para 13, even if subsidy given to the specific area as per registration, it is confined there and does not extend to 1st and 2nd defendant's Provisional Lease (PL)?
>
> A: Yes, correct.

[29] PW4 (Sanabung anak Sampai) is from Kampung Sg Lingkau. He is 48 years old. He said that he owns five parcels of land. They are as follows:

(1) One acre plot which is located ten metres from Kampung Sg Linkau.

(2) Twenty acres plot at Lubok Jantai which is 20 minutes by motor boat from Kampung Sg Lingkau.

(3) Two to three acre plot at Sg Bundak which is 15 minutes by motorboat form Kampung Sg Lingkau.

(4) Four acre plot at Nanga Dua Batang Kanan which is about one hour by motor boat from Kampung Sg Linkau.

(5) Four acre plot at Lubok Sedayung which is half an hour by motorboat from Kampung Sg Lingkau.

[30] He said that Tradewinds Sdn Bhd who is the contractor of the first and second defendants had encroached into some of these lands. However, he did not say whether the "temuda" lands were located within the PLs area.

[31] PW5 (Jampong anak Nyaun) is 78 years old. He is from Kampung Sg Lingkau. He moved to Kampung Sekendu when he married his wife. About 20 years ago he moved to Kampung Mumong which has hilly land to plant pepper. However, he said that he never abandoned his ancestral lands in Kampung Sg Lingkau. He said that he owns "temuda" lands in Nanga Merakai (two hours journey by paddling boat from Kampung Sg Lingkau), Parit Lawa (400 metres from Kampung Sekendu) and Lubok Kenanang (one mile from Kampung Sekendu). However, he did not refer to any encroachment of his "temuda" lands by the first or second defendants. During cross-examination, he could not point to the locality map and tell the court whether those land are within the PLs area.

[32] PW6 (Chakul anak Kidar) is 65 years old. He is from Kampung Sg Lingkau. He is a third generation resident of Kampung Sg Lingkau. He said that besides a titled land, SOT 387, he inherited several other plots of "temuda" land. He said that an oil palm company had encroached into the pemakai menoa of his kampung and his inherited lands about four years ago. However, PW6 also did not say whether his "temuda" lands are within the PLs area issued to the first and second defendants.

[33] PW7 (Basis anak Laman) is from Kampung Sg Lingkau. He is 70 years old. He is a third generation resident of this village. He said that he inherited Occupation Ticket No: 431 which is a five acre plot of land. However, he said that the said land had not been encroached by second defendant.

[34] PW8 (Sandi anak Bakeh) is from Kampung Sg Lingkau. He is 43 years old. He said that he inherited occupation ticket 383/26 which was once owned by his grandfather. He said that his father owned two plots of land at Sg Jerin and Tanjung Raba. However, he said that second defendant had not encroached into his occupation ticket 383/26. Nonetheless, second defendant had encroached into the "pulau" of his village. During cross-examination, PW8 said that he owns 30 acres of land although it is not stated in his witness statement.

[35] PW9 (Budi anak Tuai Rumah Empi) is from Kampung Sekendu. This witness is the Tuai Rumah of Kampung Sekendu. He made reference to permits (Stencils No. S348, S3578, S1295 and S1259) issued to his father to plant rubber and coconut. However, he said that an oil palm company had come close to his family lands but yet to encroach. He also said that he had been granted fertiliser subsidies by the Pertubuhan Peladang Kawasan which took over the task for managing subsidies from the agriculture department. He said that he was never informed that his NCR would be given away to the first and second defendants. He was not aware of the constitution of the Simunjan Forest Reserve either. This witness assisted PW12 in drawing map "M". However, he could not point out the boundary of the "pemakai menoa" of his village.

[36] PW10 (Sungkin anak Aji) is 48 years old. He is from Kampung Sekendu. His grandfather was also born in Kampung Sekendu. He had been receiving fertiliser subsidies since 1987. He said that his "temuda" land has no land title. When he filled the form to receive subsidy, he noted in the column that his land is "tanah tanpa geran". However, he said that the first and second defendants had encroached into the NCR area of his village. He said that for the purpose of the suit, he is claiming 14 acres. He also complained that the "communal forest" of his village had been trespassed by oil palm companies.

[37] PW11 (Ajan bin Wein) is 62 years old. He is married to a resident of Kampung Sg Lingkau. He claimed that he was given a plot of land measuring 108 acres by his father in law. This plot is about 22 acres from Kampung Sg Lingkau. This land is located on the right hand side of Sg Simunjan, if one goes upriver. He said that the first defendant's workers had entered into his land. PW11 also goes foraging in the jungle up to Sg Marakai which is half a day's journey away. During cross-examination, he said that he is also claiming the "pemakai menoa" of the village which is about 5,000 acres. He said that he knew his land had been trespassed because he could hear excavation works being carried out.

[38] PW13 (Tri anak Nyanau) is 53 years old. He is from Kampung Sekendu. He owns three acres of "temuda" land in Kampung Sekendu. Although he had moved to Kampung Mumong in the 1980's to plant pepper, he still returns to his land during the paddy-planting season. His complaint was that the "pemakai menoa" and the "pulau" of the village had been encroached by oil palm companies. He did not complain that his "temuda" land had been encroached.

[39] From the evidence of the witnesses recounted above, the NCR claim based on "temuda" or "tanah umai" is on thin ice. None of the witnesses could say with any certainty that their "temuda" lands were within the PLs area of the first and second defendants. The evidence that their villages had been established long before 1958 was not challenged by the counsel for the government. They gave evidence that they owned "temuda" land in their village or near their village. However, the only relevant issue in this case is whether their "temuda" land fell within the PLs area of the first and second defendants. Even PW12, the community mapper, could not say categorically whether the landmarks such as burial grounds, old settlement and "temuda" lands were within the PLs area. The evidence elicited during cross-examination is as follows:

Q: You talk about important landmarks' location. What are those landmarks that you are referring to?

A: Refer to any burial ground, any old settlement and any old orchard growth and any significant traditional practices by the community.

A Q: In this case, what are those landmarks that you have gathered?

A: I found there were few burial grounds, old settlement and temuda.

B Q: Look at the map, P 48, where is it located, the burial ground?

A: Somewhere below the village of Kampung Sungai Lingkau and also Pendam Merakai, somewhere below Kampung Sekendu.

C

Q: The one at Kampung Sungai Lingkau is outside the PL, is it correct?

A: Yes.

D Q: And same to the one above the Kampung Sekendu, correct?

A: Yes.

[40] The aerial photographs show almost the entire area of the PLs were covered with permanent and dense forest at the time E the photographs were taken in 1947 and even in 1962. As I have stated earlier, the plaintiffs did not call expert witness to interpret the aerial photographs. In the case of in *Everly Bajut ak Poh & 24 Others v. the State Government of Sarawak & 2 Ors* [Suit No: 22-26-2008], Yew Jen Kie J rejected a NCR claim based on "temuda" F land as the aerial photography evidence did not support it. She said as follows:

> In my judgment, the plaintiffs have only adduced bare statement from PW1. i.e. the 1st Plaintiff that they have acquired native customary rights over the alleged NCL under Iban customs and G traditions i.e. through clearing cultivation and occupation of the areas throughout three generations. Not only there is no corroboration to their claim, their claim has been totally demolished by the aerial photographs taken in 1947 and 1962. They showed that the alleged NCL were still vast virgin jungle. H Furthermore, a virgin jungle, once cleared, will take a hundred years to grow back to primary forest.

[41] I am mindful that in the absence of aerial photographs, ground survey evidence and oral history could support a NCR I claim based on "temuda". However, in the instant case, the oral history evidence of the villagers and that of PW12 that the

"temuda" lands were within the PLs area is not convincing as mentioned earlier. The plaintiffs did not tender any photographs of their "temuda" land, old longhouse sites or burial grounds. They could not say with certainty if their lands were within the PLs area. Most of the witnesses even said that their "temuda" lands had not been encroached by the first and second defendants but they feared this eventuality. Compared to their evidence, DW2, the Superintendent of Lands and Surveys of Samarahan Division, said that any alienated land such as occupation ticket land would not have been included in the PLs that were granted to the first and second defendants. He said as follows:

Q: You were asked about the Occupations Tickets, you said they were outside of the area of interest, please elaborate?

A: Practically before PL issued, all the alienated land must be excluded.

Q: And these Occupation Tickets outside PL?

A: Yes.

[42] In the premises, I find that the plaintiffs have not proved on a balance of probabilities that their "temuda" lands were inside the PLs area.

"Pemakai Menoa" Or "Pulau" Claim

[43] The NCR land claimed by the plaintiffs as their foraging and hunting ground is a vast area of 5,000 hectares. The 5,000 hectares area lies well beyond the perimeter of about seven villages. In map "M", the plaintiffs have neatly shaded and demarcated only three areas ie, the villages of Sekendu, Lingkau and Melanjok. The plaintiffs' case is that this 5,000 hectare area is their territorial domain. The only evidence to support this claim is the oral history related by PW2, PW3, PW4, PW5, PW6, PW7, PW8, PW9, PW10, PW11 and PW13. They said that their ancestors had hunted and foraged in this area since time immemorial. It is understandable that the plaintiffs would have difficulty in proving a claim for "pemakai menoa" by referring to documentary evidence and would have to rely on oral history. However, the evidence of the above witnesses to support the claim that their ancestors have traditionally used the said area for hunting and foraging is not cogent. Firstly, it must be noted that

the said 11 witnesses had laid a claim to a vast area. Only some of the witnesses had referred to the rule of thumb of a distance of half a day's walk within which their ancestors roamed the forests and hunted. The other witnesses claimed that the entire 5,000 hectares is the "pemakai menoa" of the three villages. I find this to be a bare and self serving assertion. PW12 took more than a week to complete his perimeter survey of the "pemakai menoa" which he demarcated in map "M". This means that the furthest extent of the 5,000 hectares area is more than half a day's walk from any of the said three villages of Sekendu, Melanjok and Lingkau. The other point to note is that the plaintiffs' expert witness on Iban customs (PW1) told the court that "pemakai menoa" is not an individual territorial domain but the territorial domain of an entire community. It can be shared by several villages and its boundaries can be discerned by natural landmarks. In the instant case, the residents of other longhouses found in the perimeter of the 5,000 hectare area of interest are not parties to the claim. In fact, as pointed by counsel for the government, the other residents of the villages of Sekendu, Lingkau and Melanjok, did not support the instant claim. The other village headmen (Tuai Rumah) did not support the claim either and this is admitted by the plaintiffs. PW6 admitted as follows during cross-examination:

Q: Is there any other longhouse nearby Sungai Lingkau?

A: Yes.

Q: Which longhouse are you from?

A: Tuai Rumah Nyukai.

Q: Tuai Rumah Nyukai is still alive, right?

A: Yes.

Q: Is Tuai Rumah Nyukai in the court today?

A: No.

Q: Does Tuai Rumah Nyukai also support your action?

A: No.

[44] Similarly, PW9 conceded that the headmen (Tuai Rumah) of two longhouses (Rumah Awat and Rumah Chong) also did not support the claim. PW9 further agreed as follows during cross-examination:

Q: You know who is Tuai Rumah for Kampung Alit?

A: Tuai Rumah Empukong.

Q: This Tuai Rumah is not claiming the land that you are claiming, correct.

A: No.

Q: This Kampung Simunjan Tebang and you mentioned Tuai Rumah Putih. Tuai Rumah Putih also did not claim the area you are now claiming, correct?

A: No.

Q: Only Tuai Rumah Sekendu and also Lingkau who are claiming the purported NCR in this action, correct?

A: Yes.

[45] PW9 also agreed that the Penghulu of the area, Penghulu Jabin also did not support the instant action. PW4, the first plaintiff, said that his own headman, Tuai Rumah Aho, did not support the action. He said as follows:

Q: I put it to you that not all the people in the three Kampung support your action, correct?

A: Correct.

Q: I further put up to you that even your Tuai Rumah did not support your action, correct?

A: Correct.

[46] Counsel for the government submitted that it is a "pre-condition" that all the residents bordering the alleged "pemakai menoa" area must support the claim. He referred to the evidence of PW1 who had testified that the "pemakai menoa" is for the benefit of the community and not the individual. I am not entirely sure if every resident who would potentially benefit from the action is required to appear in court as witness as this is a representative action. However, it is beyond dispute that the "pemakai menoa"

is for the benefit of an entire community. Therefore, although not every resident or headman in the area of interest is required to appear in court to support the claim, there should at least be considerable unanimity amongst the residents and the different villages bordering the purported "pemakai menoa" in respect of their right to assert a claim to it. In the instant, the plaintiffs themselves have admitted that the other villages, residents and headmen did not support their action. The validity of the claim of the relatively few plaintiffs from only three villages over a very large area is therefore thrown into doubt. In conclusion, the claim for the vast area of 5,000 hectares purely based on the oral history related by some of the witnesses that their ancestors hunted in that said area is not convincing.

[47] For all the above reasons, I am not satisfied that the plaintiffs have proved that they possess NCR over the area referred to in map "M".

Effect Of Striking Out

[48] In the instant case, the plaintiffs sought the following remedies against the four defendants:

(a) A Declaration order that the Plaintiffs had created and/or acquired and/or inherited Native title and/or Native Customary Rights (NCR) over the area as claimed by the Plaintiffs referred to and/or shaded and marked in the locality map marked as "M" and annexed hereto herein;

(b) A Declaration that this native title and/or rights precludes the 1st and 2nd Defendants from impairing and/or abridging the Plaintiffs' said native title and/or NCR;

(c) A Declaration that the acts of the 3rd and/or 4th Defendants in issuing the said Provisional Leases, in so far as they impair the Plaintiffs' NCR over the said NCR Land, is wrong bad and/or void;

(d) A Declaration order that the issuance of the said Provisional Leases of State Land to the 1st and 2nd Defendants in as far as the extent of that area under the said Provisional Leases overlaps and/or covers the Plaintiffs' NCR Land is unlawful, improper, unconstitutional and therefore null and void, for want of extinguishment of the Plaintiffs' NCR over the said Land;

(e) Alternatively, a Declaration that the issuance of the said Provisional Leases of State land was subject to the native title and/or native customary rights and/or usufructuary rights of the Plaintiffs in or over the said NCR Land and that the said Provisional Leases do not affect the Plaintiffs' said title and/or rights there;

(f) A Declaration that in issuing the said Provisional Leases as aforesaid, the 3rd and 4th Defendants had acted in breach of their fiduciary duty to the Plaintiffs and therefore the said Provisional Leases are null and void;

(g) A Declaration order that the area so included in the said Provisional Leases as claimed by the Plaintiffs as part of their NCR Land, the same be excised out of the area of land under the said Provisional Leases respectively as indicated or marked in the sketch maps marked as "M" annexed to this Statement of Claim;

(h) A prohibitory injunction restraining the 1st and 2nd Defendants and/or their employees, servants and/or agents from trespassing, clearing, using or occupying the Plaintiffs' said NCR Land;

(i) Alternatively, a mandatory injunction against the 1st and 2nd Defendants and/or its employees, servants and/or agents to cease operations and remove all structures and their equipments or machineries from the Plaintiffs' said NCR Land forthwith.

[49] Even after the first and second defendants had been struck out, the plaintiffs maintained the prayers for declaratory orders and for the prayer to excise the PLs area from the purported NCR area. In my opinion, even if the plaintiffs had proved the existence of NCR in the area of interest, these prayers cannot be granted as it would affect the rights of the first and second defendants who had been struck out as defendants on the ground of want of prosecution.

Decision

[50] For all the above reasons, the claim of the plaintiffs is dismissed with costs of RM10,000.